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THE ISHIMATSU CASE

EFACE

The following article does not attempt to reweigh the dence concerning Miss Chizuko Ishimatsu's dismissal m the University of California Medical Center Library. escribes her case to demonstrate two things: first, that employees of the University of California, except those have tenure status or a contract, are without security employment; second, that the University of California not be trusted to act according to any accepted rules of tice and fair play when it wants to get rid of an employee is not so protected.

We have made no effort to present a detailed or objec- history of the case. The brief history we do present ntended only to give the reader adequate background wledge. It was drawn almost exclusively from briefs appeals filed by Miss Ishimatsu's attorneys, and is refore biassed on her behalf. These were the only his- ies of the case readily available to us.

We regard the sections which follow this history as most significant parts of the article. They are largely oted to quotations from the transcripts of the hearings ore Judge Karesh and Professor Haire. We have at- npted to limit our comments to a minimum, so that the ord can speak for itself. We believe it does speak for elf, clearly and unequivocally, and that what it says is enormous importance for all University of California ployees.

STORY

Miss Chizuko Ishimatsu was appointed as Head of the talog Department of the University of California Med- l Center Library, San Francisco — a collection of arly 300,000 volumes — on February 1, 1962. She had road background of library experience, in Japan as ll as in the United States. Her recommendations were scribed as outstanding.

At the time of Miss Ishimatsu's appointment, there re serious problems at the Medical Center Library. taloging procedures were outmoded, there were no es- lished routines, and there were arrears of 5000 uncat- ged volumes. Physical working conditions were poor. e room occupied by the Catalog Department was small d cramped. There were no outside windows. The air nts opened upon the morgue, which gave off "peculiar ells and foul air."

There were personnel problems, as well. The staff of the Catalog Department consisted of five employees, two of whom were described as incompetent by the former head of the department. A third person had already been scheduled for transfer. Shortly after Miss Ishimatsu's arrival, a sixth employee was hired without her consultation, and this person also proved to be unsatisfactory.

Miss Ishimatsu rearranged the room, made a time study of procedures, instituted a work-flow routine, established a schedule which permitted some of the workers to be out of the room's unhealthful atmosphere for some time each day, and held regular staff meetings to discuss new methods and to commend the productive contributions of staff members. The 5000-volume backlog was cleared up.

In less than three years Miss Ishimatsu produced a smoothly functioning department. She was promoted from Librarian II to Librarian III. In February 1964, the Provost of the Medical Center visited her department to compliment her on its high level of performance, productivity, and cooperation with other library departments. The rate of employee turnover diminished: only two persons left in 1964, none at all in the six months prior to her departure in January 1965. At the time of her separation, every single member of the staff testified to her competence as a supervisor and to their own satisfaction with the department. Her immediate superior, Mrs. Helen Rolen, said she wanted her back, and was one of nine library employees who testified to her efficiency, helpfulness, tact, fairness and consideration, and specifically rebutted particular instances cited by the witnesses for the Medical Center.

The evidence against Miss Ishimatsu was drawn from two sources: former employees, and the Administrative Librarian of the Medical Center, Mrs. Carmenina T. Tomassini. The defense introduced evidence to show the instability and inefficiency of these former employees. A portrait of the Administrative Librarian emerged from the testimony as a troubled person with uncontrollable emotions, who shouted at subordinates, had an explosive temper, stamped her feet in angry petulance, insulted department heads, criticized library personnel in front of other staff and at times the public. Staff members testified that she hired incompetent and unsuitable employees for the Catalog Department, and that on at least one occasion she told an incoming employee that Miss Ishimatsu was a difficult person to work with and that the

employee should watch out for trouble and report it immediately. Mrs. Tomassini was never called to the stand to explain, deny or rebut this testimony.

(In September 1966 Mrs. Tomassini transferred to the Davis Campus of the University, where she has since served as librarian — with the academic rank of Specialist — for the National Center for Primate Biology.)

Miss Ishimatsu's professional competence was never at issue. Milton H. Gordon, the attorney for the University of California, made this clear at the start of the initial hearing. "First of all," he said, "we are not concerned with Miss Ishimatsu's competence as a cataloger. That is not the reason for her termination." He gave the reason as her "seeming inability to handle people with whom she did not find herself in agreement or whom she did not like in a manner which was conducive to the continued efficient operation of the Catalog Department "

On December 28, 1964, Miss Ishimatsu was informed of her dismissal, to be effective January 12, 1965. She filed a protest against this dismissal on January 5, 1965, in accordance with the rules of the University of California Medical Center Grievance Procedure for Nonacademic Personnel. The grievance was denied.

Appeal was taken to the Personnel Appeals Committee on January 15, 1965. A hearing was held on February 15–17, under the auspices of this Committee, with Professor Mason Haire of the Institute of Industrial Relations, UC, Berkeley, serving as Special Hearing Officer. Professor Haire's report and recommendation, dated February 25, 1965, was delivered to Miss Ishimatsu by Chancellor John B. deC. M. Saunders of the Medical Center with his letter of March 11, 1965 sustaining the dismissal.

This decision was appealed to President Clark Kerr, who notified Miss Ishimatsu on April 30 that further review was refused. This refusal was then appealed to the Regents of the University on May 14. When this appeal also was rejected, Miss Ishimatsu petitioned the District Court of Appeal of the State of California, First Appellate District, for a writ of mandate to compel the University to set aside her discharge and reinstate her. A hearing was held before Judge Joseph Karesh on September 28 and November 15, 1965.

We present excerpts from these hearings in the following sections of this article. All the page-numbered quotations refer to the transcript of the Karesh hearing; quotations from the Haire hearing are indicated by an "H" following the text. In arranging the quotations we have made no attempt to preserve the chronology of the proceedings.

The central issues seem to us to be two: First, the question of security of employment at the University of California. Second, the conduct of the University in the case of this particular employee when she proceeded to protest her dismissal. Each issue will be discussed in turn.

THE HEARINGS. PART 1: SECURITY OF EMPLOYMEN

Many employees of the University of California are probably under the impression that after an undetermine "probationary" period their employment is reasonably secure. They may assume that they cannot be dismissed except for good cause, that they are entitled to a hearing before discharge, that at such a hearing there will be an impartial review of the evidence, and that their employer must bear the burden of proof — that, as in civil law, the accused will be considered innocent until proven guilty.

None of these assumptions appears to be justified.

In the following excerpts, Milton H. Gordon speaks on behalf of the University, Mrs. Fay Stender on behalf of the appellant. "The Court" is the Honorable Joseph Karesh.

> MR. GORDON: Miss Ishimatsu's employment was strictly terminable at the will of either party. It was for an indefinite period. (p.16)
> THE COURT: Is it your position that they can fire anybody they want to at any time they want to?....
> MR. GORDON: No, there are obvious limits on anything a public body can do. We cannot fire an employee because she is a Negro....
> THE COURT: What else?
> MR. GORDON: Well, —
> THE COURT: Suppose they just do not like her?
> MR. GORDON: She is not performing satisfactorily?
> THE COURT: No. "I do not like her personality." "I do not want you around; you bother me." Can you do it?...
> MR. GORDON: As the law presently stands?
> THE COURT: Yes.
> MR. GORDON: Yes, if she has no tenure of employment; if she has no contract of employment for any given term. And this is the case here. (pp.27-28)

"Academic status"

The "academic status" of University of California librarians is no protection in this area:

> MRS. STENDER: Now, I would say this: Even though there are a bundle of rights connected with academic status, you cannot give academic status with none of those rights. (p.70)
>
> MR. GORDON: ...Academic status isn't some sort of magic thing that means something. It isn't a work of art. Academic status means something at the state colleges; it means something else at city college. It can mean different things at the University of California. For librarians, academic status means coming under the academic personnel unit, which is purely an administrative — salary administration entity. It does not hold hearings; it has never held hearings. Librarians — and she is not the first librarian to come under our grievance proceedings — librarians come under the nonacademic rules for grievance proceedings.
>
> I have stated that under oath. I'm familiar with these, I handled them. It may not be the procedure that counsel likes, but that is not the issue. I think the university should be permitted to establish the procedures it wants. It has that right. It doesn't have to give these people full-blown academic status privileges and tenure committee hearings, or something like that. (p.68)

After determination"

> THE COURT: There is no obligation, as I understand your position, to grant a hearing — correct? — before the University of California.
> MR. GORDON: Prior to determination, your Honor?
> THE COURT: Yes.
> MR. GORDON: No.
> THE COURT: But they gave her a hearing.
> MR. GORDON: After determination. (p.5)

To convince ourselves"

> THE COURT: ...The question is, having set up certain procedures, aren't they bound by those procedures? In other words, they had a hearing for her, didn't they? There was a review for her, wasn't there? You just cannot give a hearing for nothing.
> MR. GORDON: Yes, you can have a hearing to satisfy yourself administratively, your Honor. (p.48)
> THE COURT: Why did you give her a hearing?
> MR. GORDON: The purpose of the hearing was to convince ourselves that she had no valid grievance.
> THE COURT: Why convince yourself? I assume you were convinced before you let her go.
> MR. GORDON: Well, —
> THE COURT: That just does not make sense.
> MR. GORDON: — yes, sir; convinced on a prima facie basis. If the university, as a matter of administrative procedure, wishes to afford itself an opportunity to review a termination to see that all things were followed appropriately, I don't see where that, in itself, creates a tenure status at the university. (pp. 49-50)

An idle act"

> THE COURT: ... you give hearings in all cases just to satisfy yourselves?
> MR. GORDON: Yes, sir, when it is requested, in all grievance proceedings.
> THE COURT: What do you engage in an idle act for?
> MR. GORDON: It is not an idle act for the university, any more than any of our other personnel procedures are. (p.50)
>
> THE COURT: The point is, counsel, you have set up a hearing procedure. You have, in effect, said before these people may be discharged they have hearings. There was a hearing here.

> MR. GORDON: After her discharge.
> THE COURT: But you gave her a hearing.
> MR. GORDON: Yes. But —
> THE COURT: That does not mean it is applicable in all cases. I am considering this case. If you feel, counsel, that they shouldn't have any hearing, don't give it to them. And that will be another issue some day. But I do not think you ought to give them a hearing and then say, "Well, we are satisfied." Why do you have to have a hearing? Look it over yourself and decide whether you want to let her go....
>
> Why give a hearing just to satisfy yourself? Why give her a hearing? Just check it for yourself What do you want to give her a hearing for?
> MR. GORDON: We might drop them after this. (p.50)

"Suppose he just doesn't like her?"

Judge Karesh questioned the University's attorney on the lack of safeguards against prejudice in such a procedure:

> THE COURT: Suppose it is a good grievance. If it is —
> MR. GORDON: If it is a good grievance, then the hearing officer makes a recommendation to the —
> THE COURT: Suppose he just doesn't care; he just doesn't like her?
> MR. GORDON: Our hearing officer?
> THE COURT: Yes. Just suppose. I have had some officers that I have perhaps felt that they didn't like the party.
> MR. GORDON: I think that the chancellor, being a man of honor, after reviewing the record, would probably state that he doesn't care for the recommendation of the hearing officer and he is reinstating the employee.
> THE COURT: But if he didn't, could the Court order it?
> MR. GORDON: Legally, no, your Honor. (pp.32-33)

"He has changed the rule"

On September 28, the Court recessed the hearing to permit both counsels to prepare and present briefs on points of law. In the interval, on November 5, President Kerr issued a "clarification" of his 2 July 1962 memorandum, which had stated that "the change from nonacademic to academic status will not affect existing fringe benefits and working conditions." President Kerr now explained:

> Under this statement, it was intended that any grievances of professional librarians would continue to be governed by, and processed in accordance with, Nonacademic Personnel Rule 26 and campus regulations implementing that rule. It was also intended that all other nonacademic personnel rules not inconsistent with the new classification and salary compensation plan announced in the July 2 memorandum would continue to be applicable to librarians. This interpretation will continue in effect until completion of a study covering all non-faculty academic appointees including librarians.

The hearing resumed on November 15:

MRS. STENDER: We certainly don't consider that the right to have an academic hearing on a dis charge is anything you could call a fringe benefit, because it is the essence of academic status. (p.57)

THE COURT: It is too late to mandate, since they have already changed their rules. I cannot mandate them to hold a hearing under rules which presently wouldn't give them a hearing. ...

Mr. Kerr doesn't want your lady back to work, does he?

MRS. STENDER: I am thinking it is shocking that in the middle of litigation he comes in with an interpretation of something issued in 1962 that people have been allowed to think meant something else. ... (p.69)

...Are you going to allow him to revoke it in the middle of litigation?

THE COURT: That is not the point. The point is, you cannot issue a writ of mandate to compel him to do something after he has changed the rule. (p.71)

"This hearing doesn't mean anything"

THE COURT: Now, suppose she had tenure. I am not holding she has tenure.

MR. GORDON: The essence of tenure is termination only for cause.

THE COURT: So you have three points. One is this hearing doesn't mean anything. "We can fire anybody for anything we want to — who doesn't like the color of our eyes," for instance.

MR. GORDON: Who doesn't have a tenure status.

THE COURT: Yes. Oh, —

MR. GORDON: Or doesn't have a contractual relationship.

THE COURT: Contractual may be different. They will sue you for breach of contract.

MR. GORDON: That is the point; that is the first point. (pp.50-51)

MR. GORDON: In the absence of tenure or security of employment, neither of which is present here, there is no legal right to University employment. University employees are not under the State Civil Service Act. There were no union labor agreements present, so the grievance proceeding is a matter set up by the University voluntarily in an attempt to discover if employees or former employees have been grossly or unfairly treated. It is not used as a procedure whereby the University must defend action relating to the termination of an employee. The University's judgment in such case, except perhaps in a situation where gross and manifest unfair treatment is present, must be final. (H)

THE HEARINGS. PART 2: THE CONDUCT OF THE UNIVERSITY

If the University of California is not bound, except in a tenure or contract situation, then all an employee can rely upon is its good will and sense of fair play. It is instructive to observe in the Ishimatsu case how fair and honorable the University was. This is most clearly shown in the initial hearing, conducted by Mason Haire, appointed by the University as Special Hearing Officer. Mr. Gordon again represented the University. Mr. Garry represented Miss Ishimatsu. Mr. Aguilar, an attorney for the California State Employees' Association, also represented the appellant. (All excerpts are from the Haire hearing, unless otherwise indicated.)

"As informal a hearing as possible"

MR. HAIRE: Let us not go back into a history of hearing procedures. I think we can work out some procedures here. I think we want as informal a hearing as possible and yet at the same time a complete, comprehensible and equitable hearing of the facts of the matter, and I think we can work that out. ...

"The burden of proof"

MR. GORDON: It is the position of the University, and it has been in all past personnel grievance hearings, that the burden of proof, as it were, is on the aggrieved party.

MR. AGUILAR: We do not agree with the statement that Mr. Gordon made that it is proper for the appellant to carry the burden of proof. We do not agree with that. That to us, all these methods that they have been saying "we used in the past," these are star-chamber methods.

"Never under oath"

MR. GARRY: We want to be able to get this testimony from the witnesses under oath pertaining to the facts of her inability to get along with her subordinates. ...

MR. GORDON: To my knowledge these hearings have never been conducted under oath.

This hearing was not conducted under oath.

"Due process of law"

MR. GARRY: I keep hearing constantly what they have done in the past. I do not care what they have done in the past. If there is going to be a hearing it has got to be a fair one, it has got to have due process of law involved in it. If they feel we are not entitled to a hearing, that is their prerogative to state that position, but when we are here we do not want star-chamber proceedings and we want to be able to cross-examine witnesses under oath so that they can be prosecuted for perjury in case they lie about anything, and we want this hearing to represent due process of law.

"The names of the witnesses"

MR. GARRY: Now I want to make this statement for the record and I want the record to show this: Yesterday afternoon and prior to that time we demanded, not asked, but demanded, to know the witnesses who were going to testify against us so that we could be prepared here and not come in here at the last minute and have to scramble around to find out just exactly what the facts are, and I was informed by Mr. Gordon yesterday that there was no right under his authority to grant me such a request and he refused to give me the names of the witnesses.

"We can't cross-examine"

MR. GARRY: We have not been given the courtesy or the privilege of hearing from this department head, Mrs. Tomassini. We were given no explanation why she isn't here. She is the person, apparently, that instigated all of this. This is the person who indicated that interpersonnel relationship of Miss Ishimatsu was bad and yet she is not here to speak. She hasn't been here so we can't cross-examine her.

"I wouldn't predict that they would take this matter to court"

In the course of the hearing before Judge Karesh, it came to light that no official transcript had been kept of the earlier hearing before Mason Haire. The defense had been forced to hire its own reporter, at a cost of about six hundred dollars. (The total cost to Miss Ishimatsu of her action against the University has amounted to approximately three thousand dollars.) Mr. McTernan speaks for the appellant:

MR. McTERNAN: They wouldn't furnish a transcript. We had to hire our own reporter to go there.

THE COURT: You mean you do not have a transcript?

MR. GORDON: No, sir.

THE COURT: Why not? You were very optimistic without a transcript. You would want the Court to decide it.

MR. GORDON: Well, your Honor, I can't predict — I wouldn't predict that they would take this matter to court. (Karesh, p.40)

THE COURT'S CONCLUSION

Judge Karesh denied Miss Ishimatsu's petition for a writ of mandate to set aside her discharge and reinstate her. He conceded that the University of California "can fire you for anything if they want to just fire you. They have got that right." He stated several times during the hearing, however, that if the law permitted him to review the case on its own merits, "I would put her back to work" He could not, because his hands were tied: "What I would like to do and what I could do are two different things under the law as I see it, and I am bound by the law." (Karesh, p.74)

POSTSCRIPT

Here the Ishimatsu case rests. Referring to the University of California, Judge Karesh said at one point: "There are great powers vested in these agencies — tremendous power. The courts, counsel, have very little — almost powerless to do anything."

This article has shown how great the University's power is. It is so great that it can interpret its own regulations in any way it pleases; or rewrite them in the middle of litigation; or even cancel them completely. The Court may declare, as this Court did, that it would be very pleased to be reversed on its decision that it is powerless to rule: the University is not moved. Except for certain basic constitutional and statutory safeguards, like those against discrimination on the basis of race or color, the University, in matters relating to employment, is largely beyond the authority of the civil courts of the State of California.

There is good historical reason for the University to have been granted power sufficient to remove it from the political control of the State Legislature in Sacramento. We can all be grateful that the University continues to have the strength and independence to withstand the constant pressures that the public and the press bring to bear upon it according to the varying winds of political fashion and emotional involvement. But great power can be greatly abused; and we have seen in this case the extent to which the principles of justice can be corrupted by an institution whose very existence is predicated upon the observance and teaching of the highest ethical standards.

CU Voice is not primarily concerned about the fact of Miss Ishimatsu's dismissal, although the evidence seems to show that it was arbitrary and unwarranted. We are more concerned about what that dismissal indicates for all employees of the University not protected by tenure or labor contract. It indicates the grave inadequacy of the grievance procedures the University has set up. It indicates that they exist for the convenience of the University rather than for the protection of the employee. It indicates the helplessness of the employee in the face of self-righteous administrative hearings, where the University appoints judge and jury, and tries the employee after judgment has been pronounced upon him.

It also indicates the urgent need for reform. The University must be persuaded to recognize the twentieth century. The time is long past when an organization employing thousands of people all over the State can claim exemption from observing the minimal safeguards that industry has acknowledged for generations. Respect for the rights of others should not be foreign to the purposes of a great university.

Librarians on the Berkeley Campus: you need no longer accept injustice as your natural lot. An application for membership in the University Federation of Teachers, AFL-CIO, is included with your copy of CU Voice. Fill it out and mail it to P. O. Box 997, Berkeley, California 94701; or deliver it personally to any union member you know. Help yourself by helping us in the Library Chapter of Local 1474 to lend added strength and dignity to the University and to the profession of librarianship.

Editorial

What can you do when your employer has the right to fire you if he doesn't like the color of your eyes, and doesn't intend to relinquish that right?

One thing you can do is appeal to him, ask him to provide safeguards against arbitrary personnel practices. You can hope he will understand that the minor loss he suffers in administrative sovereignty will be more than compensated for in the confidence and loyalty an employee may feel when his employer substitutes contractual assurances for majestic doubletalk.

Or you can protest to your immediate superior. You can write letters, as a concerned individual, to Library and University administrators. You can find colleagues to commiserate with. You can quit. You can pray.

The Library Chapter, in early July of this year, submitted to the Librarian's Office, the Chancellor's Office and the Regents, a detailed, carefully-worked-out grievance procedure to take the place of the discredited one now in effect. It suggested that this be adopted as an interim procedure, pending approval of a plan to be written after two separate University committees complete the investigations on which they are now engaged. The Chancellor's Office has declined to accept the new proposal, preferring to wait until those committees complete their surveys and draft their own grievance procedure. How long will that take? One year? Two years? Five years? No one can say. It's in the hopper and, committee members and University Administration willing, it may some day emerge.

Is there anything else you can do? YES: you can do what more than forty professional librarians on the Berkeley campus have already done: you can join the organization that fights for librarians' rights, and add your voice to the growing chorus which insists that remedial action must be taken now, not in some vague future maybe-never land. You can join with us in demanding that the University of California accept the principle of collective bargaining, and provide contracts for its employees. You can insist that you be treated as a professional, and not as a helpless pawn in a calculated game of academic chess.

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UC Librarians Statewide

More than one librarian has asked a question of fac or inquired into a policy that affected him, only to be t if he persisted long enough, that no one in his own libra or on his own campus could answer that question or ex plain that policy. The word comes down: "It's Statewid — which can often be translated into: "A committee i looking into that" or, "A committee will be appointed look into that" — which means, in turn: "Until the ma ter is reconsidered, sooner or later, the old policy, if any, will remain in effect."

We in Local 1474 have frequently found ourselves i this position. The statewide regulations on the use of University bulletin boards, under study a year ago, are still not determined. And recently we were told that a interim grievance procedure for librarians on the Berk ley campus could not be accepted because such proced ures are of statewide concern and cannot be approved o the local level.

We feel that the only way University of California li brarians are going to be able to cope with this situation is to form a statewide organization of their own. As a first step, we invite librarians to volunteer their servi for the distribution of CU Voice on each campus We i vite librarians to tell us of their reactions to our effor and to keep us informed of developments in their own libraries.

As a further step, we propose that plans be made f a statewide conference of rank-and-file University of C ifornia librarians. At this conference we would seek t establish an organization to serve us at the statewide l el. To that end, we urge interested librarians to get t gether on each campus to choose a representative. If this is difficult to arrange on your campus, get in touc with us as individuals. We would like to begin working out the details for such a conference as quickly as pos sible. Please write to: Annette Voth, c/o CU Voice, Box 997, Berkeley, California 94701.